



IN THE
Supreme Court of the United States
OCTOBER TERM 1942

HENRY KRAVITZ,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN SUPPORT OF PETITION

Opinions Below.

No opinion was rendered by the Court of Special Sessions apart from the comments appearing in the case on appeal (44, 51-57).

The opinion of the Appellate Division of the Supreme Court, Second Department, is reported in 262 App. Div. 911, 28 N. Y. S. 2nd 938.

The opinion of the Court of Appeals is reported in 287 N. Y. 475.

Jurisdiction.

The judgment of the Court of Appeals of the State of New York now sought to be reviewed was entered on March 5th, 1942. The jurisdiction of the Supreme Court of the United States is invoked under Section 237 of the Judicial Code as amended, otherwise known as 28 U. S. C., Section 344, Subdivision b.

Statutes Involved.

The subject sections of the Penal Law of the State of New York are as follows:

"Sec. 974. KEEPING OF PLACE FOR GAME OF POLICY.

A person who keeps, occupies or uses, or permits to be kept, occupied or used, a place, building, room, table, establishment or apparatus for policy playing or for the sale of what are commonly called 'lottery policies,' or who delivers or receives money or other valuable consideration in playing policy, or in aiding in the playing thereof, or for what is commonly called a 'lottery policy', or for any writing, or document in the nature of a bet, wager, or insurance upon the drawing or selection or the drawn or selected numbers of any public or private lottery; or who shall have in his possession, knowingly, any writing, paper or document, representing or being a record of any chance, share or interest in numbers sold, drawn or selected, or to be drawn or selected, or in what is commonly called 'policy', or in the nature of a bet, wager or insurance, upon the drawing or selection, or the drawn or selected numbers of any public or private lottery; or any paper, print, writing, number, device, policy slip, or article of any kind such as is commonly used in carrying on, promoting or playing the game commonly called 'policy'; or who is the owner, agent, superintendent, janitor, or caretaker of any place, building, or room where policy playing or the sale of what are commonly called 'lottery policies' is carried on with his knowledge or after notification that the premises are so used, permits such use to be continued, or who aids, assists, or abets in any manner, in any of the offenses, acts or matters herein named, is a common gambler, and guilty of a misdemeanor."

"Sec. 975. POSSESSION OF POLICY SLIPS.

The possession, by any person other than a public officer, of any writing, paper, or document representing or being a record of any chance, share or interest in numbers, sold, given away, drawn, or selected, or to be drawn or selected or in what is commonly called 'policy', or in the nature of a bet, wager or insurance upon the drawing or selection, or the drawn or selected numbers of any public or private lottery, or any paper, print, writing, numbers of device, policy slip, or article of any kind, such as is commonly used in carrying on, promoting or playing the game commonly called 'policy' is presumptive evidence of possession thereof knowingly and in violation of the provisions of section nine hundred and seventy-four."

Statement of the Case.

A summary statement of the case and of the argument is set forth in the petition.

Specification of Error To Be Urged.

The error to be urged is identical with the reason for allowance of writ set forth in the foregoing petition.

ARGUMENT.

The construction placed by the Court of Appeals upon Penal Law, Sections 974, 975, is so utterly at variance with the common and accepted definition and understanding of the crime of policy (or possession of policy slips) as to render the statutes vague, ambiguous, indefinite and accordingly repugnant to the due process clause of the Constitution.

Before discussing the principal question, we desire to indicate that we deem the federal question sufficiently raised and preserved by this record, for the following reasons: Petitioner was tried without the assistance of counsel. The learned Trial Court declined to hold the cause pending the arrival of his attorney, the Presiding Justice saying (22-23), "Proceed to trial without your lawyer." Therefore, in any event the rule requiring the seasonable assertion of the constitutional right would not be too meticulously applied. Secondly, petitioner's brief in the Court of Appeals—at a time when petitioner was respondent, having prevailed in the Appellate Division—explicitly suggested, with citation of authority that any construction of the word "policy" at variance with its common and accepted meaning would render the statute "too ambiguous for judicial construction and the section would therefore be unconstitutional" (p. 8). Finally, and most important, when the ruling on the constitutional aspect of the case comes unexpectedly and at the termination of a litigation, when the party aggrieved no longer has any right to add to the record, it is established law that the question is regarded as preserved. *Saunders v. Shaw*, 244 U. S. 317, revg. 138 La. 917, 70 So. 910. Petitioner herein could not have reasonably anticipated that the Court of Appeals was about to reject all established definitions of the crime involved and make a ruling that invaded his con-

stitutional rights; in such a situation the question is held to be adequately presented. *Herndon v. Georgia*, 295 U. S. 441.

It is noteworthy that the conviction upheld herein was under a statute which several times refers to the prohibited offense as the possession of slips for "playing the game commonly called 'policy'." The statute makes no direct attempt to define "policy," but the word appears in quotation marks in the statute itself. This would indicate a legislative intent that the courts should have recourse to the common and generally accepted definition and understanding of the term.

The method of playing is described in *People v. Elliott*, 74 Mich. 264, 266, 41 N. W. 916:

"Persons who wish to play 'policy,' as he calls it, pay the respondent a sum of money, usually from five to fifty cents, and at the same time select two, three, or four numbers, from one to seventy-eight."

Particular attention is directed to the element that the player selects his own number or numbers. The *Elliott* case is the only one quoted on the subject of method of playing policy in the article on "Gaming" in 27 C. J. 961, 972.

Likewise, in the early New York case of *Wilkinson v. Gill*, 74 N. Y. 63, decided in 1878, Church, Ch. J., wrote:

"The mode of 'playing policy' was described by the plaintiff as follows: 'I selected certain numbers, and handed those numbers into the office then, and if those numbers came out in the drawing, why I made money; if they did not, I lost.'"

Again the selection of the numbers by the player is a material feature of the game.

In *People v. Edelstein*, 231 App. Div. 459, 247 N. Y. S. 546, *affd.* in 256 N. Y. 660, defendant was convicted of a violation of Penal Law, Sections 974, 975—the identical statutes

involved herein—by reason of possessing certain lottery slips whose ultimate value depended upon the outcome of a horse race. The conviction was reversed on appeal on the ground that the chance was dependent “not on the selection of numbers as in the game of policy,” Martin, J., writing:

“The definitions of the game of policy and explanations of the manner in which it is played provide for the player to guess numbers or series of numbers as the winning combination.”

The distinction was preserved in *People v. Bloom*, 248 N. Y. 582, and in *People v. Weber*, 245 App. Div. 827, 281 N. Y. S. 414. In *People v. Hines*, 284 N. Y. 93, it was said:

“Policy as conducted by the combination was a scheme of chance in which the player selected a number containing three figures.”

The principle of number-selection by the participant is reiterated by lexicographic authority. In the definition of “policy” in the Funk & Wagnalls New Standard Dictionary (p. 1918) it is said, “A player names any number or combination of numbers,” while a “policy-ticket” is defined thus: “In policy-playing, a player’s voucher for the numbers selected by him.”

Finally, in the case at bar, in reversing the conviction, the Appellate Division wrote:

“While the record does not clearly describe the slips, it appears that each slip is folded and the edges sewed together so that the printing on the inside cannot be seen unless the thread is ripped and the slip opened. When this is done the words “Pru Treasury Balance” appear, and underneath is the date and an arrow pointing to a number. The player does not know the number

until after he has purchased the slip and he can learn the number only after he has opened the slip he bought. In our opinion the papers in defendant's possession were not shown to be policy slips, although they may represent interests in a lottery. Penal Law, Sec. 1370. Not every lottery is policy. *People v. Hines*, 284 N. Y. 93, 196. Policy is in the nature of a 'bet, wager or insurance' upon the drawing of numbers in which the player selects his own number or series of numbers as the winning combination."

Notwithstanding, the Court of Appeals herein for the first time rejected all previous standards, saying (by Conway, J.):

"The distinction is narrow and we think that the method of selection by the player of the number to be played should not be the conclusive factor in determining whether there is possession knowingly of a writing or paper representing an interest in numbers to be drawn or selected or in what is commonly called policy."

It would seem superfluous at this time to argue such a well-settled principle as that relating to the requisite explicitness of penal statutes. A penal law must "inform those who are subject to it what conduct on their part will render them liable to its penalties." This is a requirement "consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law" (*Connally v. General Const. Co.*, 269 U. S. 385, 391).

In invalidating a New Jersey penal statute for vagueness and uncertainty, this Court recently declared, by Mr.

Justice Butler (*Lanzetta v. State of New Jersey*, 306 U. S. 451, 453):

"No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids."

Similarly, in voiding another criminal statute for indefiniteness, in *United States v. Cohen Grocery Co.*, 255 U. S. 81, this Court, by Mr. Chief Justice White, took cognizance of "the conflicting results which have arisen from the painstaking attempts of enlightened judges in seeking to carry out the statute."

The difficulty with the statute now under consideration is that five learned justices of the Appellate Division concurred in giving it a certain construction and in according to the word "policy" a meaning and connotation which they properly conceived to be dictated by a long line of controlling authority—to say nothing of common understanding and usage. This judicial definition is then upset by seven judges of the Court of Appeals who see fit to ascribe to the same term a new meaning, hitherto unsanctioned by either judicial ruling or general custom. A situation may thus fairly be regarded as having arisen where a penal law is so vague "that men of common intelligence must necessarily guess as its meaning and differ as to its application." A defendant required to guide his acts and conduct by such a statute may not be said to have enjoyed due process of law. If before committing the act involved he had been entitled to consult the five justices of the Appellate Division, they would have advised him that what he contemplated doing was no violation of Penal Law, Sections 974, 975. Nevertheless, he would have been destined to a rude awakening, for the Court of Appeals was constrained to rule otherwise. The diversity of opinion entertained by two distinguished appellate tri-

bunals in the same jurisdiction as to the very definition of the offense proscribed, is the surest indication that the statute is constitutionally deficient in failing to furnish an ascertainable standard for the guidance of individuals. No layman, whatever his intelligence, could reasonably be expected to anticipate the eventual construction adopted by the Court of last resort.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the application for a writ of certiorari should be granted.

Respectfully submitted,

JACOB W. FRIEDMAN,
Attorney for Petitioner.